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Vestiges of Legal Protectionism: The Successor Attorney

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Vestiges of Legal Protectionism: The Successor Attorney

In our complex and interdependent society, human relations are constantly being fit into a framework of legal rights and responsibilities, and in this process, the role of the attorney has become increasingly crucial.[1] As more individuals come to depend upon the attorney, his role must broaden and deepen to meet the additional social responsibility.[2] A subject upon which divergent opinion has been expressed among various American jurisdictions is the extent of liability that an attorney incurs to third parties while acting on behalf of a client.[3] The traditional view is that an attorney can not be held liable to a third person with whom he is not in privity, and thus, to whom he owes no legal duty of care.[4] This traditional view has been modified or abolished in many states.[5]

Under present California law, the determination of whether a duty undertaken by an attorney extends to a third party not in privity involves a balancing of factors, including the extent to which the plaintiff was intended to be affected by the transaction, the foreseeability of harm to plaintiff, the certainty that plaintiff was injured, the closeness of the connection between the defendant's conduct and the injury, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[6] In general, an attorney's liability to third persons is restricted to those who are intended beneficiaries of the performance of a duty by the attorney.[7] This comment will examine one aspect of the present controversy surrounding the issue of an attorney's liability to third parties—the successor attorney situation.

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1. *See* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 194, 491 P.2d 421, 432-33, 98 Cal. Rptr. 837, 848-49 (1971).

2. *Id.*

3. *See* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 109, 128 Cal. Rptr. 901, 904 (1976). *See generally* Note, *Attorneys' Negligence and Third Parties*, 57 N.Y.U.L. REV. 126 (1982).

4. *See* Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958); *see also* Goodman v. Kennedy, 18 Cal. 3d 335, 342, 556 P.2d 737, 742, 134 Cal. Rptr. 375, 380 (1976); Wallach & Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA L. REV. 257, 262-63. *See generally* Note, *supra* note 3.

5. *See* Note, *supra* note 3, at 126, 132-44.

6. *See supra* note 4; *see also Roberts*, 57 Cal. App. 3d at 110, 128 Cal. Rptr. at 905.

7. *See, e.g., Goodman*, 18 Cal. 3d at 342-44, 556 P.2d at 742-43, 134 Cal. Rptr. at 380-81 (1976); *see also* Heyer v. Flaig, 70 Cal. 2d 223, 228, 449 P.2d 161, 164, 74 Cal. Rptr. 225, 228 (1969). *See generally* Note, *supra* note 3, at 138-44.

Simply defined, the successor attorney situation arises when an attorney (Attorney I) sued for malpractice by a former client, alleges that the client's present attorney (Attorney II, the successor attorney) negligently managed the client's interests following Attorney I's initial act of malpractice.[8] As the result of Attorney II's negligence, the damages for which the client seeks to hold Attorney I fully responsible are enhanced.[9] To avoid liability for the portion of the client's loss that may be attributed to the conduct of Attorney II, Attorney I desires to cross-claim against Attorney II in the malpractice action brought against him by the former client.[10]

Two distinct theories of recovery should be available to Attorney I in these circumstances. First, Attorney I should be permitted to cross-claim against Attorney II for professional negligence, alleging that Attorney II breached a legal duty of care owed Attorney I as a foreseeable plaintiff.[11] Attorney I's second theory of recovery is for comparative indemnity,[12] as promulgated by the California Supreme Court in *American Motorcycle Assn. v. Superior Court*.[13] Relying upon the principles of comparative negligence adopted in *Li v. Yellow Cab*,[14] the court in *American Motorcycle* modified the common law doctrine of equitable indemnity to permit apportionment of liability among multiple tortfeasors on a comparative fault basis.[15] To cross-claim against Attorney II for comparative indemnity, Attorney I need merely allege that Attorney II breached the legal duty of care owed to the client, exacerbating the client's damages.[16] If the client is successful in his suit

8. *See* Held v. Arant, 67 Cal. App. 3d 748, 750, 134 Cal. Rptr. 422, 423, *hearing denied* (1977); *see also* Gibson, Dunn & Crutcher v. Superior Court, 94 Cal. App. 3d 347, 349-51, 156 Cal. Rptr. 326, 327-28, *hearing denied* (1979); Parker v. Morton, 117 Cal. App. 3d 751, 754-55, 173 Cal. Rptr. 197, 198-99 (1981); Goldfisher v. Superior Court, 133 Cal. App. 3d 12, 23, 183 Cal. Rptr. 609, 615 (1982).

9. *See id.*

10. *See supra* note 8.

11. *See Gibson*, 94 Cal. App. 3d at 357-61, 156 Cal. Rptr. at 332-34 (Jefferson (Bernard), J., dissenting); *cf. Goodman*, 18 Cal. 3d at 350-54, 556 P.2d at 747-49, 134 Cal. Rptr. at 385-87 (Mosk, J., dissenting) (although not a successor attorney situation, the court reasons that the absence of a direct service to or intent to benefit a third party does not preclude an attorney's liability). *But see Held*, 67 Cal. App. 3d at 751, 134 Cal. Rptr. at 422-23.

12. *See* American Motorcycle Ass'n. v. Superior Court, 20 Cal. 3d 578, 583-84, 578 P.2d 899, 902, 146 Cal. Rptr. 182, 185 (1978). The court uses the terms "comparative indemnity" and "partial indemnity" interchangeably throughout its opinion. To avoid confusing the reader, this Comment will use only the term "comparative indemnity." *See generally infra* notes 148-285 and accompanying text.

13. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

14. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

15. *American Motorcycle*, 20 Cal. 3d at 583, 578 P.2d at 901-02, 146 Cal. Rptr. at 184-85 (1978).

16. The standard used to determine whether a cause of action for equitable indemnity lies has been the subject of varying interpretation and application. As the court in *American Motorcycle* noted:

> Dean Prosser was at a loss in attempting to state the applicable standard: "Out of all this, it is extremely difficult to state any general rule or principle as to when indemnity

against Attorney I, Attorney II should then indemnify Attorney I for the amount of damages attributable to Attorney II's negligent conduct.[17]

With few exceptions, courts have refused to permit Attorney I to cross-claim against Attorney II on either a negligence or a comparative indemnity theory.[18] Whether these claims should be allowed has not been decided by the California Supreme Court. The purpose of this comment is to examine why the denial of an attorney's cross-claim for professional negligence or comparative indemnity filed against a successor attorney unnecessarily perpetuates a practice that will be referred to by this author as "legal protectionism."

As will be demonstrated in this comment, a successor attorney should not be insulated from having to bear full responsibility for the consequences of his negligent conduct. The immunization of a successor attorney from liability can be justified neither by a refusal to find a duty owed predecessor attorney,[19] nor by an unwillingness to apply the doctrine of comparative indemnity.[20] By expanding the concepts of legal duty of care[21] and adopting principles of comparative fault,[22] the courts have underscored the primary importance of holding an individual responsible for the harm which he negligently inflicts upon others.[23]

An attorney should not be afforded special treatment when faced with the consequences of his negligent conduct merely because of his membership in the legal profession.[24] Certainly, strong arguments support judicial consideration of the unique nature of the attorney-client relationship in situations where an attorney's liability for professional negligence is at issue.[25] Arguments for precluding attorney liability must be carefully weighed against the policies that favor ensuring indi-

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> will be allowed and when it will not. It has been said that it is permitted only where the indemnitor has owed a duty of his own to the indemnitee; that it is based on a 'great difference' in the gravity of the fault of the two tortfeasors; or that it rests upon a disproportionate or difference in character of the duties owed by the two to the injured plaintiff. Probably none of these is the complete answer. . . .
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> . . .[T]he duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a significant difference in the kind or quality of their conduct.

20 Cal. 3d at 594-95 n.4, 578 P.2d at 909, 146 Cal. Rptr. at 192.

17. *See generally infra* notes 241-285 and accompanying text.
18. *See Goldfisher*, 133 Cal. App. 3d at 14, 183 Cal. Rptr. at 610.
19. *See infra* notes 92-148 and accompanying text.
20. *See infra* notes 241-85 and accompanying text.
21. *See infra* notes 33-52 and accompanying text.
22. *See infra* notes 151-61 and accompanying text.
23. *See infra* notes 176-88 and accompanying text.
24. *See generally Goodman*, 18 Cal. 3d at 350-54, 556 P.2d at 747-49, 134 Cal. Rptr. at 385-87 (Mosk, J., dissenting); *see also Neel*, 6 Cal. 3d at 194, 491 P.2d at 432-33, 98 Cal. Rptr. at 848-49.
25. *See supra* notes 4-8 and accompanying text.

vidual responsibility for negligent conduct.[26]

This comment focuses on the public policy arguments that have been advanced to support and refute the desirability of permitting an attorney to cross-claim against his successor. The author takes the position that Attorney I should be allowed to cross-claim against Attorney II for both professional negligence[27] and comparative indemnity.[28] Because of the compelling nature of the public policies supporting these claims,[29] the existence of the attorney-client relationship should not serve as an insurmountable barrier to attaining a desirable and equitable result.[30]

The two causes of action available to Attorney I are addressed in separate sections of this comment, the first section focusing on the cross-claim for professional negligence. An analysis of the comparative indemnity cause of action will follow. In both of these sections, the background, general development, and case law concerning the application of the respective causes of action to the successor attorney situation will be examined. A discussion of the public policy considerations involved in permitting an attorney to cross-claim against a successor attorney concludes each section.

CROSS-CLAIM FOR PROFESSIONAL NEGLIGENCE

Few decisions have discussed the propriety of an attorney's cross-claim for professional negligence against a successor attorney.[31] In those cases in which the issue has been reached, the courts have disallowed the claim, based on a determination that Attorney II owed no legal duty of care to Attorney I.[32] Since the element of duty in a cause of action for negligence has presented the most obstinate hurdle for courts to cross in deciding to impose liability upon a successor attorney, this section will be confined primarily to a discussion of the duty issue.

A. Background

When an attorney accepts employment to give legal advice or to render legal services, he impliedly agrees to use ordinary skill, judgment, care and diligence in the performance of the tasks he under-

26. *See supra* notes 7-8 and accompanying text.
27. *See infra* notes 92-148 and accompanying text.
28. *See infra* notes 241-85 and accompanying text.
29. *See infra* notes 92-148 and 241-285 and accompanying text.
30. *See* Commercial Standard Title Co. v. Superior Court, 92 Cal. App. 3d 934, 946-53, 155 Cal. Rptr. 393, 401-05 (1979) (Cologne, Acting P.J., dissenting).
31. *See Held*, 67 Cal. App. 3d at 751, 134 Cal. Rptr. at 423; *see also Parker*, 177 Cal. App. 3d at 758-67, 173 Cal. Rptr. at 201-06; *Goldfisher*, 133 Cal. App. 3d at 15-23, 183 Cal. Rptr. at 610-15.
32. *See, e.g.*, 67 Cal. App. 3d at 751, 134 Cal. Rptr. at 423.

takes.[33] Traditionally, an attorney's liability for the negligent performance of his professional duties has extended only to his client, and not to third parties injured by the attorney's conduct arising out of the professional relationship with the client.[34] The basis for the refusal of courts to extend liability to third parties has been the concept of privity of contract.[35] For many years, an allegedly negligent attorney's liability was effectively confined to his or her client on the theory that in the absence of privity, a tortfeasor owes no duty to an injured plaintiff.[36]

California courts were among the first to expand attorney liability.[37] In the decision of *Biakanja v. Irving*,[38] the California Supreme Court rejected the privity requirement by finding that a notary public owed a duty of care to the intended beneficiary of an improperly attested will.[39] Three years later, the court in *Lucas v. Hamm*,[40] expanded an attorney's liability to third parties by stating that a testator's attorney could owe a duty of care to the beneficiary of a will.[41] As subsequently explained in *Heyer v. Flaig*,[42] "when an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client, but also with the client's intended beneficiaries."[43] It is this relationship that creates the duty of care owed by the attorney.[44]

The existence of a legal duty of care is an essential element of tort liability.[45] Whether an attorney owes a duty of care to a third person is the first determination that must be made before liability can be found.[46] The issue of duty is a question of law, and depends upon a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances.[47] As the California

33. Lucas v. Hamm, 56 Cal. 2d 583, 591, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961), *cert. denied*, 368 U.S. 525 (1962).
34. *See* Note, *supra* note 3, at 126.
35. *Id.* at 126, 132-137.
36. *Id.* at 135-37; *see also* Biakanja v. Irving, 49 Cal. 2d at 650, 320 P.2d at 19 (1958).
37. *See* Note, *supra* note 3, at 135-36, 139.
38. 49 Cal. 2d 647, 320 P.2d 16 (1958).
39. *Id.* at 650-51, 320 P.2d at 18-19.
40. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821.
41. *Id.* at 591, 364 P.2d at 689, 15 Cal. Rptr. at 825.
42. 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).
43. *Id.* at 228, 449 P.2d at 164, 74 Cal. Rptr. at 228.
44. *Id.; see also* 1 B. WITKIN, CALIFORNIA PROCEDURE *Attorneys* §144, at 154-55 (2d ed. 1970).
45. Nava v. McMillan, 123 Cal. App. 3d 262, 265, 176 Cal. Rptr. 473, 475 (1981); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* §5, at 2306 (8th ed. 1974).
46. *See* 18 Cal. 3d at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381; *see also* Morales v. Field, DeGoff, Huppert & MacGowan, 99 Cal. App. 3d 307, 315, 160 Cal. Rptr. 239, 243, *hearing denied* (1979).
47. 18 Cal. 3d at 342, 556 P.2d at 742, 134 Cal. Rptr. at 380. As stated by William L. Prosser in LAW OF TORTS §53 (4th ed. 1971):

Supreme Court initially stated in *Biakanja*:[48]

> [T]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[49]

When considering the issue of whether an attorney's duty of care extends to third persons not in privity, California courts have limited attorney liability to third parties who are intended beneficiaries of the attorney's actions.[50] An attorney's duty of care should not be so restricted. When a balancing of the *Biakanja* policy factors favors extending an attorney's liability to third parties, a duty should be recognized.[51] In general, absent overriding policy factors, an attorney's duty of care should extend to any person who might foreseeably be injured by the attorney's negligent conduct.[52]

B. The Duty Issue Defined

The following analysis focuses specifically on the duty issue presented when an attorney (Attorney I), sued for malpractice by his former client, seeks to cross-claim against the attorney (Attorney II) subsequently retained by the client to extricate him from the situation created by Attorney I's negligence. This factual situation was first before the California courts in the case of *Held v. Arant*,[53] decided by the Second District Court of Appeal. In that case, an attorney (Attorney I) was sued by his former client for legal malpractice.[54] The client alleged that Attorney I's negligent representation of him in the negotiation and drafting of an agreement resulted in the client being sued for

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> [I]t should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.

48. 49 Cal. 2d 647, 320 P.2d 16.

49. *Id.* at 650, 320 P.2d at 19.

50. *See, e.g.*, 18 Cal. 3d at 342-43, 556 P.2d at 742-43, 134 Cal. Rptr. at 380-81; *see also* 67 Cal. App. 3d at 751, 134 Cal. Rptr. at 423; Mason v. Levy & Van Bourg, 77 Cal. App. 3d 60, 68, 143 Cal. Rptr. 389, 393 (1978).

51. *See* 18 Cal. 3d at 353, 556 P.2d at 749, 134 Cal. Rptr. at 387; *see also infra* notes 92-148 and accompanying text.

52. *See infra* notes 100-12 and accompanying text.

53. 67 Cal. App. 3d 748, 134 Cal. Rptr. 422, *hearing denied* (1977).

54. The elements of an action for professional negligence are: (1) a duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. Budd v. Nixen, 6 Cal. 3d 195, 200, 491 P.2d 433, 436 (1971), 98 Cal. Rptr. 849, 852.

misrepresentation in inducing the agreement.[55] Attorney I sought to cross-claim against the attorneys (Attorney II) whom the client subsequently retained to represent him in the misrepresentation action. The theory proposed in the defendant's cross-claim was that the subsequent attorneys were negligent in advising the client to settle legally defensible claims in the misrepresentation action.[56] As a result, Attorney I claimed to have suffered damage in being exposed to liability for malpractice and injury to his professional career.[57]

The *Held* court, relying upon earlier appellate decisions restricting an attorney's duty of care to intended beneficiaries,[58] quickly dismissed the defendant's cross-complaint for negligence and devoted primary attention to the issue of equitable indemnity. Although the focus of the decision was on the indemnity issue, the policy considerations underlying a judicial determination of whether Attorney II owes a legal duty of care to Attorney I are the same.[59] The primary policy consideration cited by the *Held* court in support of the dismissal of Attorney I's cross complaint was essentially preserving the sanctity of the attorney-client relationship.[60] The court reasoned that imposing upon a successor attorney the duty to act with reasonable care toward Attorney I would impermissibly impinge upon the undivided loyalty Attorney II owes his client.[61]

Comparing the successor attorney situation with the situation presented when a physician seeks to treat a patient for injuries caused by a prior tortfeasor, the *Held* court reasoned that the peculiar nature of the attorney-client relationship precludes the imposition of a duty upon Attorney II.[62] In the case of a negligent physician, the possibility that the physician may be sued for indemnity by the initial tortfeasor does not inhibit the physician's performance of his professional duty.[63] In contrast, explained the court, when an attorney is retained to represent the interests of his client against persons who are actual or potential adversaries, the possibility that one of those adversaries may seek indemnity from the attorney can impinge upon the attorney's duty of undivided loyalty owed the client. Finding the possibility of a conflict of interest that could detrimentally affect Attorney II's representation

55. 57 Cal. App. 3d at 750, 134 Cal. Rptr. at 423.
56. *Id.* at 750-51, 134 Cal. Rptr. at 423.
57. *Id.*
58. *Id.* at 751, 134 Cal. Rptr. at 423 (citing National Auto. & Cas. Ins. Co. v. Atkins, 45 Cal. App. 3d 562, 565, 119 Cal. Rptr. 618, 619 (1975)).
59. *See generally* 18 Cal. 3d at 342-44, 556 P.2d at 743-44, 134 Cal. Rptr. at 380-81.
60. *See* 67 Cal. App. 3d at 752-53, 134 Cal. Rptr. at 424.
61. *Id.* at 752, 134 Cal. Rptr. at 424.
62. *Id.*
63. *Id.*

of the client, the *Held* court refused to permit Attorney I's cross-claim.[64]

The rationale advanced by the *Held* decision is clearly suspect.[65] A comparison of the influence that the threat of a lawsuit may have upon a successor physician in the treatment of his patient with the effect of threatened litigation upon a successor attorney in the handling of his client's affairs, reveals striking similarities.[66] The positions in which the physician and the attorney may find themselves are essentially the same. Both owe their respective patients and clients the highest duty of good faith and fidelity. The possibility that the successor attorney would choose a course of conduct other than one best designed to protect his client's interests if the alternative would be to subject himself to a malpractice claim is the same possibility that exists when a successor physician is presented with a similar choice.[67]

In the medical profession, the behavior that results when a physician attempts to safeguard his own interests has been termed "defensive medicine."[68] As the *Held* court recognized, this same defensive conduct can occur in the legal field.[69] Special treatment, however, has been afforded attorneys based solely upon the "peculiar nature" of the attorney-client relationship.[70] This preferential consideration has not been available to members of the medical profession. In fact, some jurisdictions subject physicians to strict liability for services provided.[71] Whether the restriction of the duty of care owed third persons by attorneys is justified when compared with the expanded liability of those who practice medicine is a question beyond the scope of this comment. Nonetheless, the analysis of the *Held* court comparing the duties owed by attorneys and physicians should be open to criticism as being extremely narrow and lacking in substantial rational or empirical support.

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64. *Id.*

65. *See* 117 Cal. App. 3d at 759 n.2, 173 Cal. Rptr. at 201-02.

66. *See id.*

67. *Id.*

68. *See generally* Comment, *Malpractice Suits: The Increased Cost of Health Care*, 8 TULSA L.J. 223, 227 (1972), in which the practice of defensive medicine is described as: "[t]he use of extra diagnostic tests, the opinion of one or more consultants, and other defensive practices [which] may safeguard the interest of the physician, but [which] must be paid for by the patient." The dimensions of the problem have also been described as follows:

> [I]n the current malpractice climate, even the most competent physicians feel vulnerable to malpractice suits and are practicing defensive medicine. They freely admit that they prescribe unnecessary x-rays and diagnostic tests, and that they tend to keep patients hospitalized longer than would otherwise be indicated.

Bernzweig, *The Malpractice Crisis: A Government Expert's View*, 39 INS. COUN. J. 24, 24-25 (1972).

69. *See* 67 Cal. App. 3d at 752-53, 134 Cal. Rptr. at 423-24.

70. *See id.*

71. *See generally* Note, *Strict Liability The Medical Malpractice Citadel Still Stands*, 11 CREIGHTON L. REV. 1357 (1978).

Following *Held*, the next case to discuss a successor attorney's duty, though not directly, was that of *Gibson, Dunn & Crutcher v. Superior Court*.[72] In *Gibson*, Attorney I's cross-claim was solely one for comparative indemnity, and yet the court relied heavily upon *Held*, as well as the California Supreme Court decision of *Goodman v. Kennedy*.[73] Comparative indemnity was not discussed in *Goodman*. The issue was whether an attorney's duty of care should extend to a third party who deals with the attorney's client at arm's length.[74]

In *Goodman*, attorney-defendant Kennedy advised his clients, the principal officers in a corporation, that shares of stock could be issued to them as stock dividends and sold to third persons without jeopardizing the registration exemption requirement extending to purchasers of the stock.[75] Plaintiffs purchased stock from the clients. Later, when the Securities and Exchange Commission suspended the exemption causing the value of the stock to depreciate, plaintiffs sought to hold attorney-defendant Kennedy liable. Plaintiff's theory of recovery included damages for (1) the incorrect advice that Kennedy gave his own clients and (2) conscious nondisclosure to the plaintiff's attorney of matters that would have indicated the possibility of adverse consequences from the stock purchase.[76]

Relying upon the intended beneficiary theory of *Lucas v. Hamm*[77] and *Heyer v. Flaig*,[78] the plaintiffs argued that attorney Kennedy's duty of care extended to them as third party beneficiaries of the advice Kennedy gave his clients.[79] Not only was Kennedy's advice "intended to affect" them as purchasers, but the harm plaintiffs suffered was a reasonably foreseeable consequence of the attorney's alleged negligent conduct. The California Supreme Court rejected the plaintiff's arguments on both factual and policy grounds. The court first noted the absence of a relationship between the plaintiffs and the defendant that would create a duty of care to the plaintiffs.[80] No allegation had been made that Kennedy's advice was in fact communicated to or relied upon by the plaintiffs, nor did the evidence support a conclusion that the advice to the clients was given for the purpose of enabling the clients to discharge any obligation owed the plaintiffs.[81] Furthermore,

72. 94 Cal. App. 3d 347, 156 Cal. Rptr. 326, *hearing denied* (1979).
73. 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976).
74. *Id.* at 339, 556 P.2d at 743, 134 Cal. Rptr. at 378.
75. *Id.*
76. *Id.* at 342, 556 P.2d at 741-42, 134 Cal. Rptr. at 379-80.
77. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821.
78. 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225.
79. 18 Cal. 3d at 343-44, 556 P.2d at 742-43, 134 Cal. Rptr. at 380-81.
80. *Id.*
81. *Id.*

stated the court, undesirable self-protective reservations would be injected into the attorney's counseling role if an attorney were to be held liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the advice, but also to other parties to the transaction with whom the client deals at *arm's length*. The attorney would be prevented from devoting his entire energies to the client's interests. As a result, an undue burden would be placed upon the legal profession, and the quality of legal services received by the client would be diminished.[82]

The reliance of *Gibson, Dunn & Crutcher* upon *Goodman* and *Held* arguably was misplaced, as *Held* may be viewed as wrongly decided and *Goodman* may be clearly distinguished on its face from the successor attorney situation.[83] The holding in *Goodman* therefore, should not be interpreted as binding authority upon the specific issue here considered.[84] *Goodman* may be distinguished in that the plaintiff stock purchasers were nonlawyers whose dealings with both the defendant-attorney and the client had been strictly at *arm's length*.[85] In contrast, in the successor attorney situation, the plaintiff-client had dealt with both Attorney II and the third party (Attorney I) in a fiduciary capacity.[86] The *Goodman* court expressly limited its holding to situations in which the third party dealt with the attorney's client at *arm's length*.[87] Since Attorney I, as the third party in the successor attorney situation was a fiduciary of the client, the *Goodman* rationale clearly does not apply.

The decision rendered by the *Goodman* court was not unanimous.[88] Justice Mosk, joined by Justice Tobriner in his dissent, emphasized the factor of foreseeability, concluding that attorney Kennedy owed a duty to the plaintiffs based on a balancing of the factors enumerated in *Biakanja*.[89] The refusal of the court to impose a duty upon an attorney under the circumstances of *Goodman*, as viewed by the dissent, unfairly penalized innocent persons whose injury was the foreseeable result of the attorney's negligence. As a logical consequence of rejecting the compulsive privity doctrine, Justice Mosk stated that an attorney should be liable to third persons injured as the result of the attorney's

82. *Id.*
83. *See generally supra* note 8.
84. *See* 94 Cal. App. 3d at 357-61, 156 Cal. Rptr. at 332-34 (Jefferson (Bernard), J., dissenting).
85. *See* 18 Cal. 3d at 339, 556 P.2d at 743, 134 Cal. Rptr. at 381.
86. 94 Cal. App. 3d at 357, 156 Cal. Rptr. at 332 (Jefferson (Bernard), J., dissenting); *see also* Remainders, Inc. v. Bartlett, 215 Cal. App. 2d 295, 299, 30 Cal. Rptr. 191, 194 (1963).
87. 18 Cal. 3d at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381.
88. *Id.* at 350-54, 556 P.2d at 747-49, 134 Cal. Rptr. at 385-87.
89. 18 Cal. 3d at 353, 556 P.2d at 749, 134 Cal. Rptr. at 387 (Mosk, J., dissenting); *see supra* notes 34-35 and accompanying text.

negligent advice to his client when that advice inevitably will harm the other person.[90] Even though "gross extensions of liability. . . involving similar conduct and results, can be conjured up. . .," the dissent concluded that "recovery under such fanciful circumstances could be denied for remoteness." The liability of the attorney to third parties should be limited to cases in which, like *Goodman* and *Biakanja*, the only recourse of the injured party is to sue the negligent attorney.[91]

Exactly how the *Biakanja* factors apply to the successor attorney situation is crucial to a determination of whether a court should permit Attorney I's cross-claim for negligence against Attorney II. The section that follows will demonstrate that the policy factors enumerated in *Biakanja* strongly favor the existence of a duty owed by Attorney II to Attorney I. Attorney I, therefore, should be allowed to cross-claim against Attorney II for all damages proximately caused by Attorney II's failure to exercise due care.

C. Application of the Biakanja Factors

The judicial restriction of an attorney's liability to intended beneficiaries of the attorney's conduct is without substantial justification in the factual situation presented when Attorney I seeks to cross-claim against Attorney II. The California Supreme Court in *Biakanja* listed six factors to balance in determining whether a defendant will be held liable to a third person not in privity.[92] These factors are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.[93]

Many courts have interpreted the first of the *Biakanja* factors to imply that the third party must be an intended beneficiary of the attorney-client relationship.[94] Without an intended beneficiary status, these

90. 18 Cal. 3d at 354, 556 P.2d at 749, 134 Cal. Rptr. at 387.

91. Id. at 353, 556 P.2d at 749, 134 Cal. Rptr. at 387. In *Biakanja*, the intended beneficiary had no right of action against the estate, and his sole recourse was against the person who had drafted the will. The plaintiffs in *Goodman* could not recover against the corporation or the corporation's principal officers, since the corporation's stock was without value and the officers allegedly were insolvent.

92. 49 Cal. 2d at 650, 320 P.2d at 19.

93. *Id.*

94. *See* 67 Cal. App. 3d at 751, 134 Cal. Rptr. at 423; 49 Cal. App. 3d at 921, 123 Cal. Rptr. at 239-40; 45 Cal. App. 3d at 565, 119 Cal. Rptr. at 619; *see also* 77 Cal. App. 3d at 68, 143 Cal. Rptr. at 393; 70 Cal. 2d at 226-29, 449 P.2d at 163-65, 74 Cal. Rptr. at 227-29.

courts have refused to find the existence of a duty.[95] If Attorney I is required to be an intended beneficiary of the relationship between Attorney II and the client before a duty will be recognized, it is unlikely that liability will be imposed in the successor attorney situation.[96] As literally worded, however, the first factor does not appear to require that the third party be an intended beneficiary; the consideration is the extent to which Attorney I was intended to be *affected* by the relationship between Attorney II and the client.[97]

Certainly, Attorney II could not avoid *affecting* Attorney I by his conduct.[98] In deciding upon a course of action designed to extricate the client from the predicament created by Attorney I's negligence, Attorney II would undoubtedly be cognizant that his actions could impact upon Attorney I's potential liability to the client.[99] The effect of Attorney II's conduct upon Attorney I might, in some respects, be only incidental. However, when considering the fact that Attorney II is suing Attorney I on behalf of the client for legal malpractice, the intentional aspect of Attorney II's actions becomes obvious. By filing a malpractice suit against Attorney I on behalf of the client, Attorney II intended to directly affect Attorney I's professional reputation and financial liability, thus satisfying the first balancing factor.

Regarding the second *Biakanja* factor, the foreseeability of harm, Attorney I was clearly a foreseeable plaintiff that could potentially be injured by the conduct of Attorney II.[100] Foreseeability has been recognized by courts and commentators alike as the primary factor in establishing the existence of a legal duty of care.[101] When the class of persons likely to suffer damage is reasonably foreseeable, as in the successor attorney situation where the harm to Attorney I is a direct consequence of the negligent conduct of Attorney II, a duty of care is justifiably imposed.[102]

The existence of Attorney II's duty to Attorney I as a foreseeable third party conforms to the *Palsgraf*[103] principle that "[t]he risk reason-

95. *See, e.g.*, 67 Cal. App. 3d at 751, 134 Cal. Rptr. at 423; 45 Cal. App. 3d at 565, 119 Cal. Rptr. at 619.

96. *See* 67 Cal. App. 3d at 751, 134 Cal. Rptr. at 423.

97. 49 Cal. 2d at 650, 320 P.2d at 19.

98. *See* 94 Cal. App. 3d at 359-60, 156 Cal. Rptr. at 332-34 (Jefferson (Bernard), J., dissenting).

99. *See id.*

100. *Id.; see* 133 Cal. App. 3d at 22, 183 Cal. Rptr. at 615.

101. See Dillon v. Legg, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968) stating: " 'foreseeability of risk [is] of . . . primary importance in establishing the element of duty.' " *See also* Weirum v. RKO General, Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975).

102. *See* 18 Cal. 3d at 353, 556 P.2d at 749, 134 Cal. Rptr. at 387 (Mosk, J., dissenting).

103. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99, 100 (1928).

ably to be perceived defines the duty to be obeyed."[104] Duty is measured by the scope of the risk which the negligent conduct foreseeably entails.[105] As a general principle, a duty of care is owed to all persons foreseeably endangered by one's conduct, with respect to all risks which make the conduct unreasonably dangerous.[106]

If Attorney II increases the client's losses by performing his duties to the client negligently, the potential liability of Attorney I is increased.[107] Under traditional tort analysis, a negligent tortfeasor is responsible for all normal consequences that are the proximate cause of his negligence.[108] When the tortious conduct of two or more persons is a legal cause of harm that cannot be apportioned,[109] each tortfeasor is subject to liability for the entire harm.[110] In the successor attorney situation, when the subsequent independent act of Attorney II increases the harm suffered by the client, Attorney I may be held liable for the entire amount of the client's damages.[111] To compel this unjust result offends the concept of fairness and equity that our judicial system strives to promote. Judicial action should instead further the public policy of holding every person responsible for the consequences of their negligent conduct.[112]

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104. *Id.*

105. *See id.*

106. Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 434-35, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976).

107. *See* 94 Cal. App. 3d at 359-60, 156 Cal. Rptr. at 333-34; *see also* Commercial Standard Title Co. v. Superior Court, 92 Cal. App. 3d 934, 947-48, 155 Cal. Rptr. 393, 401-02 (1979) (Cologne, Acting P.J., dissenting); 20 Cal. 3d at 586-87, 578 P.2d at 904-05, 146 Cal. Rptr. at 187-88.

108. *American Motorcycle*, 20 Cal. 3d at 586, 578 P.2d at 904, 146 Cal. Rptr. at 187; 4 B. Witkin, SUMMARY OF CALIFORNIA LAW *Torts*, §624 at 2906-07 (8th ed. 1974); RESTATEMENT (SECOND) OF TORTS §432(2), at 439.

109. *See* 92 Cal. App. 3d at 943, 155 Cal. Rptr. at 399 (contending that Attorney I and Attorney II are independent wrongdoers responsible only for their own damage; the conduct of Attorney I's successor is an independent intervening cause); *see also* Zavos, *Comparative Fault and the Insolvent Defendant: A Critique and Amplification of* American Motorcycle Association v. Superior Court, 14 LOY. L.A.L. REV. 775, 785 (1980-81).

> [A]n obvious requisite for holding each of two or more such defendants liable for the entire injury is that the injury be indivisible—that is, the harm cannot be apportioned by reference to the causative contribution of the defendants. If the injury could be apportioned among two or more defendants based upon their causal contribution, then to hold them each liable for the entire injury would amount to holding both liable for more damage than was proximately caused by each.

Id.; see also Adler, *Allocation of Responsibility after American Motorcycle Association v. Superior Court*, 6 PEPPERDINE L. REV. 1, 16-19 (1978-79); W. PROSSER, LAW OF TORTS §§46-47, at 291-99 (4th ed. 1971); 1 F. HARPER AND F. JAMES, LAW OF TORTS §10.1 at 692-709 (1956); RESTATEMENT (SECOND) OF TORTS §879, at 324.

110. *See* 20 Cal. 3d at 586, 578 P.2d at 904, 146 Cal. Rptr. at 187 (adoption of comparative negligence does not warrant abolition of joint and several liability of concurrent tortfeasors); *see also* PROSSER, *supra* note 109, §§46-47, at 291-99; HARPER & JAMES, *supra* note 109, §10.1, at 692-709; RESTATEMENT (SECOND) OF TORTS §879, at 324.

111. *See generally supra* notes 107-10 and accompanying text.

112. See California Civil Code section 1714, providing in relevant part:

> (a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned by want of ordinary care or skill in the management of his property or

The third and fourth of the *Biakanja* factors,[113] concerned with proximate cause, are satisfied by the directness of the connection between Attorney II's conduct and the extent of Attorney I's liability. In the absence of Attorney II's negligence, the liability incurred by Attorney I would be only that of his own creation—a liability that he justly should bear. The negligent conduct for which Attorney I seeks recovery occurred in connection with the same transaction in which Attorney I earlier was involved as counsel for the client. Attorney I's claim is that Attorney II, in fulfilling his professional obligation to the client, failed to exercise the ordinary skill and judgment required of an attorney under similar circumstances. The failure of Attorney II to adhere to this standard of care not only resulted in a breach of the primary duty owed the client, but also constituted a breach of the duty owed Attorney I as a foreseeable plaintiff.

A legal duty of care owed by Attorney II to Attorney I should not be precluded merely upon the basis that Attorney I, whom the client is suing for malpractice, is an adversary of the client.[114] Attorney II owes both Attorney I, as a foreseeable plaintiff, and his client the same duty of care:[115] to exercise the prudence and diligence lawyers of ordinary skill and capacity commonly possess and exercise.[116] Two important distinctions must be made, however. First, although Attorney II owes his client and Attorney I the same legal duty of care, the conduct to which Attorney II must conform to avoid being negligent in the performance of his responsibilities to each varies. This dissimilarity in the standard that must be used to evaluate whether Attorney II exercised reasonable care toward Attorney I on the one hand, and to the client on the other, results from the nature of the relationship between the parties. The distinguishing factor is the existence of an attorney-client relationship between Attorney II and the client, and the absence of this relationship between Attorney II and Attorney I.

The existence of the attorney-client relationship has been the determining factor persuading the courts, as in *Goodman* and *Held*, to dismiss a third party's claim against an attorney for negligence.[117] The courts have reasoned that requiring an attorney to owe a duty of care to

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person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. . . .

113. 49 Cal. 2d at 650, 320 P.2d at 19.

114. *See* 94 Cal. App. 3d at 357-61, 156 Cal. Rptr. at 332-34; *cf.* 49 Cal. 2d at 650, 320 P.2d at 19. *But see* Morales v. Field, DeGoff, Huppert & MacGowan, 99 Cal. App. 3d at 318, 160 Cal. Rptr. at 245 (1979); Metzger v. Silverman, 62 Cal. App. 3d Supp. 30, 37, 133 Cal. Rptr. 355, 360 (1976); 77 Cal. App. 3d at 66-67, 143 Cal. Rptr. at 392-93.

115. *See* 94 Cal. App. 3d at 360-61, 156 Cal. Rptr. at 334 (Jefferson, (Bernard) J., dissenting).

116. Theobald v. Byers, 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864, 865-66 (1961).

117. *See* 18 Cal. 3d at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381; *see also* 94 Cal. App. 3d at 352, 156 Cal. Rptr. at 329.

a third party who is an actual or potential adversary of the client will necessarily impinge upon the obligation of undivided loyalty and vigorous representation that an attorney owes his client.[118] The attorney, presented with the possibility of a negligence claim by his client's adversary, would find the choices he must make in the client's best interest influenced by "self protective reservations."[119] These reservations, state the courts, would prevent the attorney from devoting his fullest energies to the client.[120]

The fact that an attorney owes a duty to his client's adversary should not cause self protective reservations to be injected into the attorney-client relationship, nor should it prevent the attorney from giving the client his undivided loyalty.[121] In fact, here is where the second distinction in the analysis of Attorney II's duty to his client and to Attorney I emerges. An attorney owes the highest duty of fidelity to his client by virtue of the attorney-client relationship,[122] and when faced with conflicting duties, the responsibility of an attorney to his client is always of primary importance.[123] Even though the duty owed by an attorney to his client and to a foreseeable third party is the same, this duty, when it is to be exercised simultaneously by an attorney on behalf of his client and a nonclient, necessarily is subject to a hierarchy of interests.

An attorney must prefer the interests of his client over the interests of a mere foreseeable third party, particularly when that third party is an adversary of the client.[124] A primary reason for this preference is the existence of a fiduciary relationship between an attorney and his client.[125] A fiduciary relationship is not found between Attorney I and Attorney II. The preference that an attorney must give his client's interests is dictated not only by case law,[126] but also by the California Rules of Professional Conduct[127] and the American Bar Association Model Code of Professional Responsibility.[128] As evidenced by all three sources, a lawyer's fiduciary duty to his client is of the highest

118. *See Held*, 67 Cal. App. 3d at 752, 134 Cal. Rptr. at 424; *see also* 94 Cal. App. 3d at 353, 156 Cal. Rptr. at 329-30; 133 Cal. App. 3d at 22, 183 Cal. Rptr. at 615.
119. 18 Cal. 3d at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381.
120. *See supra* note 123.
121. 94 Cal. App. 3d at 360-61, 156 Cal. Rptr. at 334.
122. *See* Schullman v. State Bar, 16 Cal. 3d 631, 636, 547 P.2d 447, 449, 128 Cal. Rptr. 671, 673 (1976); *see also* Greenbaum v. State Bar, 15 Cal. 3d 893, 903, 544 P.2d 921, 927, 126 Cal. Rptr. 785, 791 (1976).
123. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1979).
124. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 5-7 (1979).
125. *Id.*, n.1 & n.3; *cf.* Note, *supra* note 3, at 140-41.
126. *See* 67 Cal. App. 3d at 752, 134 Cal. Rptr. at 424; *see also* 94 Cal. App. 3d at 353, 156 Cal. Rptr. at 330. *Cf.* 18 Cal. 3d at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381.
127. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 5-102 (1979).
128. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 5-7 (1979).

order.[129] An attorney should exercise his professional judgment within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.[130]

Although an attorney has the duty to represent his client with zeal, this duty does not militate against the attorney's concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.[131] Situations in which an attorney is presented with conflicting duties are not new to our legal system.[132] Members of the legal profession are often faced with legitimate but competing interests.[133] As was stated by the California Supreme Court in *Kirsch v. Duryea*:[134]

> In addition to competing strategies, an attorney is often confronted with clashing obligations by our system of justice. An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.[135]

In *Kirsch*, the court held that when an apparent conflict exists between an attorney's duty to his client and the attorney's public obligation, the attorney will not be held liable in damages for choosing to honor the public obligation unless the choice is shown to be so manifestly erroneous that no prudent attorney would have made it.[136] The defendant-attorney's decision to delay seeking a nonconsensual withdrawal from the plaintiff's medical malpractice case, which he believed lacked merit, was made in order to minimize the adverse inference a withdrawal would create as to the merits of the case.[137] Because the attorney's decision in *Kirsch* was not "manifestly erroneous," the attorney was absolved of all liability for the choice he made between competing duties, a choice made against the best interests of the client.[138]

The rationale and test promulgated by the *Kirsch* decision is equally applicable when considering whether an attorney has breached a duty owed to a third party adversary of his client. In this situation, to prove that Attorney II acted negligently, Attorney I must show that Attorney

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129. *Id.*, EC 5-1 n.1.
130. *Id.*, EC 5-1.
131. *Id.*, EC 7-10.
132. *See* Kirsch v. Duryea, 21 Cal. 3d 303, 309, 578 P.2d 935, 939, 146 Cal. Rptr. 218, 222 (1978); *see also In re* Marriage of Flaherty, 31 Cal. 3d 637, 647, 646 P.2d 179, 185, 183 Cal. Rptr. 508, 514 (1982).
133. *See* 21 Cal. 3d at 309, 578 P.2d at 939, 146 Cal. Rptr. at 222; 31 Cal. 3d at 647, 646 P.2d at 185; 183 Cal. Rptr. at 514.
134. 21 Cal. 3d 303, 578 P.2d 935, 146 Cal. Rptr. 218 (1978).
135. *Id.* at 309, 578 P.2d at 939, 146 Cal. Rptr. at 222.
136. *Id.*
137. *Id.* at 311, 578 P.2d at 940, 146 Cal. Rptr. at 223.
138. *Id.* at 309, 578 P.2d at 939, 146 Cal. Rptr. at 222.

II's decision to act in the best interests of his client, rather than to pursue a course best designed to protect the interests of Attorney I, was manifestly erroneous. If Attorney II's decision was not manifestly erroneous, he would not have breached the duty owed Attorney I. Such an analysis necessarily entails a balancing process.

In balancing the conflicting interests, the *Kirsch* court was sensitive to the unfairness that would result if an attorney were required to pay damages merely upon a showing of a mistake in choice.[139] To hold an attorney responsible in damages whenever in retrospect, it appears that he mistakenly sacrificed his client's interests in favor of his public obligations would place what the court considered an "impossible burden on the practice of law."[140] Moreover, stated the court, awarding damages against an attorney would violate sound public policy. An attorney, faced with the question of whether vigorous advocacy in favor of a client must be curtailed in light of an obligation to the public, would decide in favor of the client at the expense of our system of justice.[141]

In the successor attorney situation, the interests of the client must be weighed against the interests of the third party attorney. Strong policy considerations support finding a duty owed to each, although as previously explained, Attorney II's duty to his client is of paramount importance.[142] Even so, an attorney should be required to exercise his position of trust responsibly so as not to adversely affect persons whose rights and interests are certain and foreseeable.[143]

The *Biakanja* court enumerated as the fifth balancing factor the moral blame attached to the defendant's conduct.[144] Attorney II's negligent behavior is not without moral blame, although negligent conduct is not as blameworthy as other types of behavior society considers reprehensible. Nevertheless, if California courts are to enforce a public policy requiring each individual to be held responsible for the consequences of his own conduct, attorneys who fail to exercise due care toward foreseeable third parties should be held accountable for the harm that results. The fact that Attorney I is also blameworthy in the successor attorney situation is irrelevant. The crucial fact is that injury, in the form of increased liability, was inflicted upon Attorney I by Attorney II's negligent behavior. For that infliction of harm, Attorney II should be held liable.

Finally, *Biakanja* urged consideration of the policy of preventing fu-

139. *Id.*
140. *Id.*
141. *Id.*
142. *See supra* notes 122-23 and accompanying text.
143. *See* 70 Cal. 2d at 229, 449 P.2d at 165, 74 Cal. Rptr. at 229 (1969).
144. 49 Cal. 2d at 650, 320 P.2d at 19.

ture harm.[145] An attorney, acting with knowledge that he may be held liable to third parties whom his conduct unreasonably and foreseeably endangers, will have a greater incentive to conform his behavior to a standard of reasonable care.[146] As a result, attorney misconduct will be deterred, preventing future harm to third parties and to the attorney-client relationship.

If a duty were imposed upon Attorney II on behalf of Attorney I, Attorney II would have greater incentive to execute his responsibilities to the client in a non-negligent manner.[147] Because of the nature of the balancing process required to find the breach of a duty owed by Attorney II to Attorney I, for Attorney II to be held liable to Attorney I, the breach of Attorney II's duty to the client must first be proved. By failing to exercise due care in his dealings with the client, Attorney II increases the client's losses from the transaction initially mishandled by Attorney I, while at the same time exposing Attorney I to additional liability in the negligence suit by the client. If Attorney II were cognizant of the fact that in breaching his duty to the client, he could not only be sued for professional negligence by that client, but also for negligence by Attorney I, Attorney II would have a potent incentive to avoid all liability.

In conclusion, the balancing of the *Biakanja* factors dictates that an attorney be allowed to cross-claim against his successor attorney for negligence, even when Attorney I is not an intended beneficiary of the attorney-client relationship. By allowing the cross-claim for negligence, important public policies would be served without sacrificing the sanctity of the relationship between Attorney II and the client. The imposition of a duty upon a successor attorney to his client's previous attorney would not diminish the effectiveness nor impair the loyalty of Attorney II. On the contrary, because of the additional risk of liability imposed upon Attorney II for the breach of duty owed Attorney I, non-negligent conduct would be encouraged. Furthermore, not only should Attorney I be permitted to cross-claim against Attorney II for professional negligence, but a claim for comparative indemnity should lie as well.

CROSS-CLAIM FOR COMPARATIVE INDEMNITY

In addition to Attorney I's claim against Attorney II for professional negligence, a second theory of recovery is available to Attorney I. The

145. *Id.*
146. *See* Note, *supra* note 3, at 127.
147. *See Commercial Standard Title Co.*, 92 Cal. App. 3d at 949, 155 Cal. Rptr. at 403.

theory of comparative indemnity permits a concurrent tortfeasor[148] to obtain indemnity from other concurrent tortfeasors on a comparative fault basis.[149] Because many courts do not require the plaintiff to show the existence of a duty owed him by the defendant before a cause of action for comparative indemnity may be stated, this theory of recovery offers third party attorneys an expanded opportunity to recover for the negligent conduct of a successor attorney.[150]

A. Historical Development of the Doctrine

Prior to *Li v. Yellow Cab*,[151] California followed the harsh common law "all or nothing" doctrine of contributory negligence. This doctrine allowed a negligent tortfeasor to escape liability for injury he proximately caused when the injured person's lack of due care was also a cause of the injury.[152] In *Li*, the California Supreme Court adopted the theory of comparative negligence, which permits an injured party's recovery to be proportionately diminished, rather than completely eliminated, when he is partially responsible for his own injury.[153]

Three years after *Li*, the court in *American Motorcycle* was called upon, in light of *Li*, to reevaluate the common law doctrine of equitable indemnity. Under this common law doctrine, "passive" or "secondarily" negligent tortfeasors were permitted to shift all liability to a more culpable or "active" tortfeasor.[154] The court in *American Motorcycle* found that the doctrine of equitable indemnity fell short of the goal in *Li* of "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respec-

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148. The distinction between concurrent and successive tortfeasors has been blurred in the case law. *See generally* PROSSER, *supra* note 109, §§47-52, at 291-323. Although the court in *American Motorcycle* applied the doctrine of partial indemnity to joint or concurrent tortfeasors, the rule is equally applicable to successive tortfeasors in the successor attorney situation. Concurrent tortfeasors have been defined as follows:

> Where the *independent* acts of several persons contribute to the injury, the wrongdoers are not joint tortfeasors, and are more properly characterized as *concurrent* tortfeasors or *successive* tortfeasors. . . . The wrongful act may actually be simultaneous or *concurrent*. . . .The acts may, however, be *successive* in point of time, one occurring before the other.

4 B. Witkin, SUMMARY OF CALIFORNIA LAW *Torts* § 34, at 2332-33 (8th ed. 1974) (emphasis added); *see* City of Sacramento v. Gemsch Investment Co., 115 Cal. App. 3d 869, 877, 171 Cal. Rptr. 764, 768 (1981) ("Where the transaction rests upon related facts, either concurrent or successive, joint or several, which legally create a detriment compensable against multiple actors, the right of indemnity should follow *AMA* guidelines, unless a contract or statute otherwise provide."); *see also* Zavos, *supra* note 94, at 783-87.

149. 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.

150. *See* 20 Cal. 3d at 594-95 n.4, 578 P.2d at 909, 146 Cal. Rptr. at 192.

151. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

152. *Id.* at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862.

153. *Id.* at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

154. 20 Cal. 3d at 583, 578 P.2d at 902, 146 Cal. Rptr. at 185; *see* Adler, *supra* note 109, at 4-6.

tive fault."[155] As a result, the common law doctrine was modified to permit a concurrent tortfeasor to obtain comparative indemnity from other concurrent tortfeasors on a comparative fault basis.[156]

The court expressly determined that the holding of *American Motorcycle* was consistent with the California contribution statute,[157] since the purpose of the legislation was to lessen the harshness and inequity of the then prevailing common law rule of no contribution.[158] Nothing could be found to suggest an intention to preempt the field or to foreclose further judicial developments promoting the purposes of the statute.[159] The court also noted that under the California Code of Civil Procedure, a defendant is authorized to cross-complain against any person from whom the defendant claims he is entitled to indemnity, even though not named in the original complaint.[160] Consequently, a defendant generally may file a cross-complaint against a concurrent tortfeasor for partial indemnity on a comparative fault basis.[161]

B. General Application

In adopting the rule of comparative negligence, the court in *Li* reserved two related issues for future resolution: the role of willful misconduct under comparative negligence principles, and contribution or indemnity among joint tortfeasors.[162] The issue of willful misconduct first was addressed by the Fifth District Court of Appeal in *Sorensen v.*

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155. 13 Cal. 3d at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864; *see* 20 Cal. 3d at 583, 578 P.2d at 902, 146 Cal. Rptr. at 185.

156. 20 Cal. 3d at 583, 578 P.2d at 902, 146 Cal. Rptr. at 185.

157. *Id.* at 583-84, 601-04, 578 P.2d at 902, 912-16, 146 Cal. Rptr. at 185, 195-99; *see* Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with* American Motorcycle Association v. Superior Court, 30 HASTINGS L.J. 1464, 1481 (1979). The Code of Civil Procedure sections 875-876 directs that contribution be allocated "pro rata" (i.e., according to the number of defendants) and not in accordance with their individual shares of fault.

158. 20 Cal. 3d at 601, 578 P.2d at 912, 146 Cal. Rptr. at 195-99.

159. *Id.*

160. California Code of Civil Procedure section 428.10 provides in relevant part:

> A party against whom a cause of action has been asserted. . .may file a cross-complaint setting forth. . .(b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction (or) occurrence. . .as the cause brought against him or (2) asserts a claim, right or interest in the. . .controversy which is the subject of the cause brought against him.

The propriety of filing a cross-complaint against a previously unnamed party is reiterated in California Code of Civil Procedure section 428.20 which provides in full:

> When a person files a cross-complaint as authorized by Section 428.10, he may join any person as a cross-complainant or cross-defendant, whether or not such person is already a party to the action, if, had the cross-complaint been filed as an independent action, the joinder of that party would have been permitted by the statutes governing joinder of parties.

161. 20 Cal. 3d at 607, 578 P.2d at 917, 146 Cal. Rptr. at 200.

162. 13 Cal. 3d at 823-26, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73.

Allred.[163] In *Sorensen*, the court held that the doctrine of comparative negligence applies in cases involving willful and wanton misconduct, just as the doctrine applies in cases involving other varieties of tortious injury.[164] The court recognized a trend toward adoption of an apportionment of the fault doctrine, irrespective of the nature of the alleged negligent conduct or other basis for liability.[165] In support of this trend, the court referred to the California Supreme Court decision of *Daly v. General Motors Corp*.,[166] in which comparative fault principles were applied to apportion responsibility between a strictly liable defendant and a negligent plaintiff in a product liability action.[167] Since the *Daly* decision, the California Supreme Court has held that the basic equitable considerations that led to the comparative indemnity rule among multiple negligent tortfeasors applies equally in circumstances involving a strictly liable defendant and a negligent defendant.[168]

The issue of contribution or indemnity among joint tortfeasors was determined by the court in *American Motorcycle*.[169] Despite the willingness of California courts to embrace the comparative indemnity doctrine of *American Motorcycle* to apportion liability between a multiple tortfeasor who is negligent and a tortfeasor who (1) is guilty of willful misconduct[170] or (2) is strictly liable,[171] comparative indemnity has been denied deserving defendants under certain circumstances. One factual situation in which the courts have generally refused to permit a cross-claim for comparative indemnity involves the successor attorney.[172] The cases that denied a defendant attorney's cross-claim against a successor attorney for comparative indemnity failed to adequately consider statutory authority as well as the underlying policies of the comparative indemnity doctrine. For this reason, those cases should be carefully scrutinized and their value as binding precedent questioned. Principles of fairness and equity in judicial decision-making require that Attorney I be allowed to cross-claim against Attorney II for the amount of injury proximately caused by the successor attorney's negligent conduct.

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163. 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (1980).

164. *Accord* Southern Pacific Transportation Co. v. State of California, 115 Cal. App. 3d 116, 118, 171 Cal. Rptr. 187, 189 (1981); *see* 112 Cal. App. 3d at 726, 169 Cal. Rptr. at 446.

165. 112 Cal. App. 3d at 723, 169 Cal. Rptr. at 444.

166. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

167. *See id.* at 742-43, 575 P.2d at 1172, 144 Cal. Rptr. at 390; *see also* Levy & Ursin, *Tort Law in California: At the Crossroads*, 67 CALIF. L. REV. 497, 530-33 (1979).

168. *See* Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 325, 579 P.2d 441, 442, 146 Cal. Rptr. 550, 551 (1978); *see also* Note, *Safeway Stores, Inc. v. Nest Kart: The Culmination of Li v. Yellow Cab Co.*, 6 PEPPERDINE L. REV. 571 (1979).

169. 20 Cal. 3d at 590, 578 P.2d at 906-07, 146 Cal. Rptr. at 189-91.

170. *See supra* notes 163-66 and accompanying text.

171. *See supra* notes 167-68 and accompanying text.

172. *See supra* notes 8-10 and accompanying text for the successor attorney situation defined.

C. Comparative Indemnity and the Successor Attorney

Attorney I's cross-complaint for comparative indemnity is supported by both statutory and case authority.[173] A review of this authority reveals two primary arguments Attorney I should advance to persuade a court to hear his claim. First, Attorney I should argue that a cross-claim for comparative indemnity is to be allowed as a matter of right.[174] Second, the claim is compelled by public policies underlying the doctrine of comparative fault.[175]

1. Comparative Indemnity as a Matter of Right

After first concluding that "a concurrent tortfeasor enjoys a common law right to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis,"[176] the court in *American Motorcycle* went on to hold that a defendant is authorized to seek indemnification from a previously unnamed party through a cross-complaint under Section 428.10 of the Code of Civil Procedure.[177] In discussing the right of a defendant to cross-complain against a potential cotortfeasor who was not joined by the plaintiff, the court found explicit statutory authority for the proposition that a defendant's cross-complaint must be allowed as a matter of right.[178]

The defendant in *American Motorcycle* argued that in permitting the joinder of alleged cotortfeasors whom the plaintiff had not joined, issues would tend to be complicated and the plaintiff would be deprived of the right to control the size and scope of the litigation.[179] The court observed, however, that the trial court is authorized to bifurcate the proceeding by ordering a separate trial of any cause of action. Section 1048(b) of the Code of Civil Procedure empowers the trial court to order separate trials "in furtherance of convenience or to avoid prejudice,

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173. *See generally infra* notes 176-285 and accompanying text.
174. *See infra* notes 176-88 and accompanying text.
175. *See infra* notes 241-85 and accompanying text.
176. 20 Cal. 3d at 604, 578 P.2d at 916, 146 Cal. Rptr. at 199.
177. *See supra* notes 154-61 and accompanying text.
178. See 20 Cal. 3d at 584, 578 P.2d at 902, 146 Cal. Rptr. at 185, stating:

> [U]nder the governing provisions of the Code of Civil Procedure, a named defendant is authorized to file a cross-complaint against any person, whether already a party to the action or not, from whom the named defendant seeks to obtain total or partial indemnity. Although the trial court retains the authority to postpone the trial of the indemnity question if it believes such action is appropriate to avoid unduly complicating the plaintiff's suit, *the court may not preclude the filing of such a cross-complaint altogether.*

(Emphasis added). *See also* 92 Cal. App. 3d at 947, 155 Cal. Rptr. at 401-02 (Cologne, Acting P.J., dissenting); Gehman v. Superior Court, 96 Cal. App. 3d 257, 266, 158 Cal. Rptr. 62, 68 (1979); Simmons, *The Effect of Comparative Fault on California Contribution/Indemnification Rights: How to Employ and Avoid the New Tortious Quicksand*, 19 SAN DIEGO L. REV. 773, 775 (1982); Comment, *Contribution and Indemnity Collide with Comparative Negligence—The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779, 802 (1978).
179. *See* 20 Cal. 3d at 606, 578 P.2d at 917, 146 Cal. Rptr. at 200.

or when separate trials will be conducive to expedition and economy."[180] The court concluded, however, that in the context of the facts presented by a comparative indemnity claim, "severance may at times not be an attractive alternative."[181] This is true given the fact that "when the plaintiff is alleged to have been partially at fault for the injury, each of the third party defendants will have the right to litigate the question of the plaintiff's proportionate fault for the accident,"[182] raising the specter of inconsistent findings.

Even though the court in *American Motorcycle* purported to give the trial court a small degree of discretion in determining whether to order a separate trial of the cause of action alleged in the cross-complaint, this discretion was effectively withdrawn.[183] As the opinion stated:

> [H]aving already noted that under the comparative negligence doctrine a plaintiff's recovery should be diminished only by that proportion which the plaintiff's negligence bears to that of all tortfeasors. . ., we think it only fair that a defendant who may be jointly and severally liable for all of the plaintiff's damages be permitted to bring other concurrent tortfeasors into the suit. Thus, we conclude that the interaction of the partial indemnity doctrine with California's existing cross-complaint procedures works no undue prejudice to the rights of plaintiffs.[184]

In conclusion, the court stated:

> [U]nder the governing statutory provisions a defendant is *generally authorized* to file a cross-complaint against a concurrent tortfeasor for partial indemnity on a comparative fault basis, even when such concurrent tortfeasor has not been named a defendant in the original complaint.[185]

The "generally authorized" qualification of the rule allowing the filing of a cross-complaint was explained by the court to preclude a cross-complaint when statutory law does not permit indemnification, and when a concurrent tortfeasor has made a good faith settlement.[186] In the case of an attorney who alleges that the negligence of a successor attorney is a concurrent cause of the plaintiff-client's injury, no substantial reason exists for denying the filing of the cross-complaint.[187] Therefore, the general authorization identified by the court in *American Motorcycle* should be interpreted to remove trial court discretion to

180. *Id.*
181. *Id.*
182. *Id.*
183. *See* 92 Cal. App. 3d at 947-48, 155 Cal. Rptr. at 401-02 (Cologne, Acting P.J., dissenting).
184. 20 Cal. 3d at 606, 578 P.2d at 917, 146 Cal. Rptr. at 200.
185. *Id.* at 607, 578 P.2d at 917, 146 Cal. Rptr. at 200 (emphasis added).
186. 20 Cal. 3d at 607 n.9, 578 P.2d at 917-18, 146 Cal. Rptr. at 200-01.
187. *See* 92 Cal. App. 3d at 947-48, 155 Cal. Rptr. at 401-02 (Cologne, Acting P.J., dissenting).

deny Attorney I's cross-complaint for comparative indemnity. The cross-complaint must be allowed as a matter of right.[188]

2. Public Policy Support

American Motorcycle indicated that the doctrine of comparative indemnity applies in "appropriate cases" to permit apportionment of liability among multiple tortfeasors on a comparative fault basis.[189] As previously noted, the court identified specific situations in which indemnity is inappropriate.[190] A reasonable conclusion to infer from this approach in which exceptions to the comparative indemnity doctrine were listed, is that the court did not intend to preclude indemnity in the case of a successor attorney. The absence of the successor attorney situation from the exceptions to the general rule permitting comparative indemnity, however, should not be viewed as decisive. More important than this absence are the public policy arguments supporting the availability of indemnity in cases involving a successor attorney's negligence.

a. Court Decisions

The public policies that support Attorney I's indemnity claim may best be examined by reviewing the various court decisions that have addressed the issue. The seminal case considering the issue of whether comparative indemnity is available in the successor attorney situation was *Held v. Arant*,[191] discussed earlier in this comment in connection with the cross-claim for negligence.[192] Decided prior to *American Motorcycle, Held* did not address the issue of whether Attorney I should have a claim for comparative indemnity based upon comparative fault principles. The court, however, did discuss the applicability of equitable indemnity as it had been adopted by the courts in medical malpractice cases.[193] Reasons of policy peculiar to the tripartite relationship of attorney-client-adversary were found by the court in *Held* to override the principle of equitable indemnity, resulting in the dismissal of Attorney I's cross-complaint.[194] The public policy cited by the court as compelling was the policy of protecting the interests of the client. If Attorney II could be required to indemnify Attorney I, the court hypothesized that this could encroach upon the duty of undivided loyalty

188. *See id.; see also supra* notes 160-61 and accompanying text.
189. 20 Cal. 3d at 583, 578 P.2d at 902, 146 Cal. Rptr. at 185.
190. *See supra* note 186 and accompanying text.
191. 67 Cal. App. 3d 748, 134 Cal. Rptr. 422.
192. *See supra* notes 53-71 and accompanying text.
193. 67 Cal. App. 3d at 751-52, 134 Cal. Rptr. at 423-24.
194. *Id.* at 752, 134 Cal. Rptr. at 424.

Attorney II owed his client.[195] The court stated:

> [Attorney II's] ability to choose between courses of conduct best designed to protect the interests of [his] client cannot be inhibited by the proposition that if [he] chooses the course of resistance of the claim [he] will be immune from liability to the one adversary absent malicious prosecution. . ., while if [he] chooses the course of prosecuting the client's claim for malpractice against a prior attorney [he] may be subject to a claim to indemnify that attorney.[196]

The critical factor in the reasoning of the court was the possibility that the attorney might prefer his own interests over the interests of the client when presented with a decision between competing courses of conduct.[197] The *Held* decision was notably lacking in discussion of the policies that would be served by permitting Attorney I's claim for indemnity.[198] Since *Held* preceded *American Motorcycle*, and since the court noted that the effect of comparative negligence principles was not raised, the issue being treated as waived, the persuasiveness and precedential value of *Held* should have been questioned by subsequent courts dealing with the identical issue.[199]

The next case[200] to confront the issue of whether to permit a successor attorney to be sued by his predecessor attorney for indemnity was *Gibson*.[201] In *Gibson*, the court adopted and expanded upon the pronouncement of public policy in *Held*, based upon equitable indemnity as applied in medical malpractice cases. Significantly, however, the *Gibson* court discussed *American Motorcycle*, facing squarely the effect of comparative indemnity upon the successor attorney situation.[202]

Gibson involved an action by a creditor against the bank and law firm that originally had advised the creditor regarding a transaction requiring the client to guarantee a note. The note was to be payable to a bank, and collateralized with certain security interests of the credi-

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195. *See id.*
196. *Id.*
197. *Id.*
198. *See supra* notes 53-71 and accompanying text.
199. *See* 94 Cal. App. 3d at 357-61, 156 Cal. Rptr. at 332-34 (Jefferson (Bernard), J., dissenting).
200. Prior to *Gibson, Dunn & Crutcher*, the court in Commercial Standard Title Co., Inc. v. Superior Court, 92 Cal. App. 3d 934, 155 Cal. Rptr. 393, *hearing denied*, (1979), rendered a split decision upholding the dismissal of the defendant's cross-complaint for partial equitable indemnity. In *Commercial Standard*, the plaintiff sued two title insurance companies for negligently and fraudulently issuing a defective lot book guarantee upon which plaintiff relied in entering into a real estate transaction. The defendant title insurance companies cross-complained against the plaintiff attorney, alleging that it was the attorney's negligence in advising the plaintiff to rely upon the guarantee that caused the plaintiff's injury. This case may be distinguished from the successor attorney situation in two respects: (1) the claim for indemnity was made by a non-attorney, and (2) the issue presented was whether the plaintiff's *prior* attorney can be subjected to a cross-complaint.
201. 94 Cal. App. 3d 347, 156 Cal. Rptr. 326.
202. *See id.* at 351-56, 156 Cal. Rptr. at 328-31.

tor's wholly owned subsidiary. The subsidiary defaulted, and a bankruptcy proceeding followed.[203] On the bank's demand, the creditor paid the note, and then retained Attorney II to extricate him from the loss he had suffered.[204] Attorney II filed an action on behalf of the creditor against the bank and Attorney I, alleging that both were negligent in failing to advise the creditor of the risk that the security interests would not be enforceable. Thereafter, the bank and Attorney I severally filed cross-complaints alleging that Attorney II was negligent in representing the creditor in the bankruptcy proceedings and that this negligence contributed to the loss the creditor suffered.[205]

The *Gibson* court viewed the law enunciated in *Goodman* and *Held* as binding precedent. As previously discussed,[206] *Goodman* is distinguishable on its facts from the successor attorney situation. Furthermore, both *Goodman* and *Held* were decided prior to the California Supreme Court decision of *American Motorcycle*.[207] Clearly, neither holding should have been considered persuasive to any degree in *Gibson*.[208] Nonetheless, the court concluded that the successor attorney could not be held liable, stating:

> What was said in *Held v. Arant* is quite as applicable to indemnification under the comparative negligence standards. Since *American Motorcycle* has greatly expanded the opportunities for defendants in negligence cases to seek indemnification from parties whom the plaintiff did not choose to sue, the hazard to the attorney-client relationship could now be vastly greater than it was under the substantive law previously in effect.[209]

The court in *Gibson*, as in *Held*, emphasized that the successor attorney was called upon to exercise his professional judgment in choosing between alternative remedies.[210] The choice presented to Attorney II in *Gibson* was whether to settle with other creditors and sue the former attorneys for the loss, or to litigate with the creditors.[211] Of primary concern to the court was the effect that a possible conflict of interest would have upon the relationship between Attorney II and the client when the client's alternatives are under consideration. Attorney II should not be required to face a potential conflict between the course that is in his client's best interest and the course that would minimize

203. *Id.* at 349-50, 156 Cal. Rptr. at 327.
204. *See id.*
205. *Id.* at 350, 156 Cal. Rptr. at 327-28.
206. *See supra* notes 83-87 and accompanying text.
207. *Goodman* was decided in 1976, *Held* in 1977 and *American Motorcycle* in 1978.
208. *See* 94 Cal. App. 3d at 357-61, 156 Cal. Rptr. at 332-34 (Jefferson (Bernard), J., dissenting).
209. *Id.* at 355, 156 Cal. Rptr. at 331.
210. *Id.* at 355-56, 156 Cal. Rptr. at 331.
211. *Id.*

his exposure to the cross-complaint of Attorney I.[212]

While concerned about the impact of a cross-claim for indemnity upon the attorney-client relationship, the *Gibson* court refused to consider as controlling what it found to be the "most conspicuous consequence of a cross-complaint against the plaintiff's lawyer": precluding that lawyer from trying the case on behalf of the plaintiff.[213] As authority for this position, the *Gibson* court cited the decision of *Comden v. Superior Court*,[214] in which the California Supreme Court held that both trial counsel and his law firm must withdraw from litigating a case whenever trial counsel determines that he or she ought to testify, or is likely to testify on behalf of the client.[215] Even though the court in *Gibson* viewed depriving a party of the lawyer of his choice as a serious matter, the *Comden* decision was interpreted as giving secondary importance to a party's need to be represented by the law firm deemed best qualified for the task.[216] Therefore, the critical consideration for denying Attorney I's cross-complaint in *Gibson* was, as in *Held*, the potential detrimental effect upon the attorney-client relationship.

Immediately after *Gibson*, the case of *Rowell v. Transpacific Life Ins. Co.*[217] was decided. In *Rowell*, the defendant insurance company was charged with misconduct in delaying payment on a disability insurance policy.[218] The insurance company sought to cross-complain against the plaintiff's present attorneys, alleging that the dilatory conduct of the attorneys and their failure to present proper supporting documentation caused the delay of payment.[219] Once again, Attorney I was denied recovery. The court in *Rowell*, with little discussion, followed *Held* and *Gibson*, stating:

> The potential of conflict between the client's best interest and the course which the lawyer must take to minimize his own exposure to a cross-complaint from the adversary is untenable in view of the law-

212. *Id.* at 356, 156 Cal. Rptr. at 331-32; *see also* 67 Cal. App. 3d at 752-53, 134 Cal. Rptr. at 424.

213. 94 Cal. App. 3d at 352, 156 Cal. Rptr. at 329.

214. 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9 (1978).

215. *Id.* at 13, 576 P.2d at 975, 145 Cal. Rptr. at 913.

216. *See* 94 Cal. App. 3d at 352, 156 Cal. Rptr. at 329. Cf. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 211(5) (1979), stating:

> If, after undertaking employment in contemplated or pending litigation, a member of the State Bar learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, *he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client*.

(Emphasis added). Attorney II would most likely be called as an adverse witness under section 776 of the California Evidence Code; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9 & 5-10 (1979).

217. 94 Cal. App. 3d 818, 156 Cal. Rptr. 696, *hearing denied* (1979).

218. *Rowell*, as *Commercial Standard*, may be distinguished from the successor attorney situation in that the claim for indemnity was made by a non-attorney.

219. 94 Cal. App. 3d at 820, 156 Cal. Rptr. at 680.

yer's duty of undivided loyalty to his client.[220]

Soon after the *Rowell* decision, the case of *Parker v. Morton*[221] was litigated. In writing the majority opinion for the court, Presiding Justice Kaufman asserted at the outset his disagreement with the public policy ground announced in *Held*.[222] The opinion expressed the view that the rights and liabilities of joint-tortfeasors as between themselves had been thoroughly settled, and that *Held* and its progeny were an unfortunate departure from precedent.[223] The *Parker* court found that the rule of comparative indemnity was derived from several well-recognized legal principles, all of which foster the important public policy of encouraging persons to act with reasonable care. As a consequence, the court held that the general rule allowing indemnity should not be departed from in the absence of compelling reasons.

No compelling reasons were present under the facts of *Parker* to justify a departure.[224] The plaintiff-wife initially had begun the action as a suit for legal malpractice against her former attorney, Parker (Attorney I), who had represented her in a dissolution proceeding.[225] In that suit, the plaintiff alleged that Parker failed to litigate her community property interest in the vested military pension of her husband. Parker cross-complained for total or partial indemnity against Morton (Attorney II), the attorney whom the plaintiff subsequently retained to remedy the problem of the unlitigated military pension. In the cross-complaint, Parker alleged that Morton had also failed to pursue the client's community property claim against the client's former husband, thereby causing or exacerbating the damages the plaintiff sought in her complaint against Parker.[226]

In allowing the claim for indemnity, the *Parker* court distinguished the situation before it from that in *Held* and *Gibson*. The court reasoned that the negligence charged by the cross-complaint was not that Attorney II was negligent in choosing between two alternative remedies, but that Attorney II exacerbated the client's damages by failing to pursue one of the remedies.[227] Attorney II was required to pursue the remedy of litigating the client's community property interest in the vested military pension plan of the client's husband in all events, both to protect the client's interests and to fulfill the client's obligation to

220. *Id.* at 821, 156 Cal. Rptr. at 681.
221. 117 Cal. App. 3d 751, 173 Cal. Rptr. 197.
222. *See id.* at 755, 173 Cal. Rptr. at 199.
223. *Id.* at 755-56, 173 Cal. Rptr. at 199-200; *see also* 133 Cal. App. 3d at 21, 183 Cal. Rptr. at 614.
224. 117 Cal. App. 3d at 756, 173 Cal. Rptr. at 198.
225. *Id.* at 754, 173 Cal. Rptr. at 198.
226. *Id.*
227. *Id.* at 760, 173 Cal. Rptr. at 202.

mitigate the damages resulting from Attorney I's negligence.[228]

The institution of a suit against the plaintiff's former spouse was necessary as a matter of law.[229] No choice of remedies or exercise of professional judgment was required of Attorney II. For these reasons, the court concluded that Attorney I's cross-claim for indemnity against Attorney II was not precluded by a conflict with Attorney II's duty of undivided loyalty to the client.[230] On the contrary, to hold Attorney II liable for his negligence would encourage attorneys in similar positions to more fully protect the interests of their clients.[231] Thus, allowing Attorney I's cross-claim was appropriate under the circumstances.

The most recent case to confront the issue of permitting comparative indemnity in the successor attorney situation is that of *Goldfisher v. Superior Court*.[232] In *Goldfisher*, Attorney I initially represented the clients in several actions, one of which was defending against a preliminary injunction.[233] The clients, believing that Attorney I negligently created the situation that engendered the lawsuit, and that the lawsuit was improperly managed, substituted Attorney II.[234] Thereafter, Attorney I, through an assignee, sued the clients for fees, and the clients employed Attorney II to represent them. Attorney II answered, and filed a cross-complaint on the clients' behalf against Attorney I for negligence. Attorney I then appeared in the fee action and cross-complained against Attorney II, alleging that Attorney II could have successfully defended the request for a preliminary injunction in the primary action, had he been properly prepared.[235] In addition, Attorney I charged that by reason of a lack of defense to the issuance of the preliminary injunction and in general, to the management of the primary action, the damages allegedly caused by Attorney I were generated, or at least exacerbated, by the professional negligence of Attorney II.[236]

After reviewing the line of successor attorney cases beginning with *Held* and ending most recently with *Parker*, the *Goldfisher* court concluded that Attorney II, when succeeding to the unfinished work of Attorney I, could reasonably foresee that if the client claimed malfea-

228. *Id.*
229. *Id.* at 761, 173 Cal. Rptr. at 203.
230. *Id.* at 767, 173 Cal. Rptr. at 206-07.
231. *Id.; see* 92 Cal. App. 3d at 949, 155 Cal. Rptr. at 403 (Cologne, Acting P.J., dissenting).
232. 133 Cal. App. 3d 12, 183 Cal. Rptr. 615 (1982).
233. *Id.* at 14, 183 Cal. Rptr. at 610.
234. *Id.*
235. *Id.*
236. *Id.*

sance on the part of Attorney I, indemnity would be sought.[237] Nevertheless, the court, citing Justice Mosk's dissenting opinion in *Goodman*, stated: "We think that *Goodman* and *Norton* do suggest limitations on extension of the rule of foreseeability."[238] The court then reasoned that encouraging claims of indemnification when two lawyers successively represent the same client does not benefit the client. The court explained:

> A multiplicity of actions germinating and emphasizing rights and principles heretofore unexploited are being continuously filed. The field of litigation, always sensitive, complex and explosive, grows geometrically. . . . The facts which generally germinate the relief sought at bench are pregnant with the seed of exacerbated conflict.[239]

The inevitable consequence of permitting the indemnity cross-claim, stated the court, "is a corrosion of the sacred attributes of complete confidentiality and undivided loyalty which are the heart of the relationship between lawyer and client." As a result, differences between lawyer and client respecting malpractice should be limited to themselves.[240]

b. Application of Public Policy Considerations

The courts generally have identified three primary public policies supporting the holding that an attorney sued by a former client for malpractice may not cross-complain against the client's successor attorney:[241] (1) as a consequence of a cross-complaint for indemnity, the client will be deprived of the attorney of his choice;[242] (2) undesirable self-protective reservations will be injected into the attorney's counseling role, thereby diminishing the quality of legal services received by the client;[243] and (3) the threat of a lawsuit by an adversary of the client will impinge upon the undivided loyalty of the second attorney in advising his client,[244] jeopardizing the policy of encouraging confidence and preserving inviolate the attorney-client relationship.[245] These policy justifications, however, either have been dismissed by the more carefully reasoned opinions on the subject, or are greatly outweighed

237. *Id.* at 21-22, 183 Cal. Rptr. at 614.
238. *Id.* at 22, 183 Cal. Rptr. at 614.
239. *Id.*, 183 Cal. Rptr. at 615.
240. *Id.*
241. *See* 117 Cal. App. 3d at 767-69, 173 Cal. Rptr. at 207-08 (Morris, J., dissenting).
242. *See, e.g., id.* at 767, 173 Cal. Rptr. at 207; 94 Cal. App. 3d at 352, 156 Cal. Rptr. at 329.
243. *See, e.g.*, 117 Cal. App. 3d at 768, 173 Cal. Rptr. at 207; 18 Cal. 3d at 344, 556 P.2d at 744, 134 Cal. Rptr. at 381.
244. *See, e.g.*, 117 Cal. App. 3d at 767, 173 Cal. Rptr. at 207; 67 Cal. App. 3d at 752, 134 Cal. Rptr. at 424.
245. *See, e.g.*, 117 Cal. App. 3d at 768, 173 Cal. Rptr. at 207; 92 Cal. App. 3d at 944-45, 155 Cal. Rptr. at 399-400.

by the public policy supporting the comparative indemnity claim. As the following discussion will demonstrate, the interests of the client and of the judicial system are best served by permitting Attorney I to cross-claim against Attorney II, and not by denying the claim, as several courts have asserted.

(1) *The Client's Choice of Attorney*. If Attorney I's cross-complaint for indemnity were allowed, Attorney II, as a practical matter, would be required to withdraw from representing the client.[246] As a result, the client would be deprived of his choice of counsel. This possible consequence is by no means determinative of whether Attorney I's cross-claim should be dismissed.[247] In fact, at least one court remains unconvinced that the filing of a cross-complaint against Attorney II will, in all cases, necessitate the withdrawal of Attorney II from representing the client in the action.[248] This same court is also of the opinion that if a problem exists concerning Attorney II's continued representation of the client, this problem should be brought to light during the pleading stage of the case, rather than in the midst of trial.[249]

Even though *American Motorcycle* approved allocation of responsibility between defendants, the opinion did not discuss whether a cross-complaint is required to obtain an adjudication of the indemnity claim, or whether an affirmative defense requesting allocation is sufficient.[250] In the defendant's petition in *American Motorcycle*, the court was requested only to permit the filing of a cross-complaint to join additional defendants.[251] Nevertheless, permitting allocation to be predicated upon the pleading of comparative indemnity as an affirmative defense is entirely consistent with the holding in that case.[252] In fact, allocation has been requested and obtained by both the cross-complaint and affirmative defense methods in California courts, with the practices varying between northern and southern California.[253]

Regardless of whether the court permits or refuses Attorney I's cross-claim for indemnity, Attorney II will still be faced with the potential

246. *See supra* notes 213-16 and accompanying text.
247. *See supra* notes 213-16 and accompanying text.
248. *See* 117 Cal. App. 3d at 766, 173 Cal. Rptr. at 206.
249. *Id.* at 767, 173 Cal. Rptr. at 206.
250. *See generally* 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182.
251. *Id.* at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186.
252. *See* Adler, *supra* note 109, at 11.
253. *Id.*

> Analogizing to the affirmative defense which raised the issue of the employer's negligence in *Witt v. Jackson*, many attorneys in northern California have relied upon the pleading of comparative contribution as an affirmative defense. On the other hand, the more common practice in southern California appears to be that this issue is placed in controversy by a cross-complaint.

Id. at 11.

ramifications of his negligent conduct. Once the cross-claim is filed, or Attorney I's defense of comparative negligence is asserted, the client will be on notice of alleged malfeasance by Attorney II. If the cross-claim by Attorney I is denied, two options are available to the client who wishes to maximize his chances of recovery for Attorney II's negligence. The client must either join Attorney II as a defendant in his suit against Attorney I, or wait until the present suit is resolved against Attorney I and then sue Attorney II for malpractice in a separate action. Neither alternative is a desirable one for the client.

If the client chooses to join Attorney II, he will be faced with potentially the same situation presented by the filing of the cross-claim. Whereas the client, when joining Attorney II, will be forced to retain yet a third attorney to conduct the action on his behalf, this consequence is not so certain when Attorney II is made a party defendant by Attorney I.[254] If the client chooses to wait for the outcome of the suit against Attorney I and then sues Attorney II in a separate action for malpractice, the client will not only be required to retain another attorney, but he must also be prepared to bear the cost of another lawsuit and to face the ever present possibility of an inconsistent result which would deny him full recovery.[255] In terms of both cost and convenience, the most desirable option for the client would be for the court to permit Attorney I to cross-claim against Attorney II for comparative indemnity.

(2) *Self-protective Reservations*. In permitting Attorney I's cross-claim for comparative indemnity, no new "undesirable self-protective reservations" will be injected into the attorney's counseling role, as feared by the courts.[256] Those reservations will necessarily exist in the absence of the cross-claim. As a practical matter, if the problem of Attorney II's alleged negligence does not appear as the result of a cross-complaint for comparative indemnity, it most certainly will arise either in the course of the defendant's discovery with respect to his defenses to the main action, or during trial.[257]

Two of Attorney I's prime defenses at trial must of necessity be that a substantial part of the damages claimed by the client were not proximately caused by Attorney I's negligence, but rather by the negligence of Attorney II, and that plaintiff failed to mitigate his damages by filing an action for professional negligence against Attorney II.[258] These de-

254. *See supra* notes 246-49 and accompanying text.
255. *See generally* Fleming, *Report to the Joint Committee*, 30 HASTINGS L.J. 1464, 1490 (1979).
256. *See supra* notes 77-82, 206-12 and accompanying text.
257. 117 Cal. App. 3d at 766, 173 Cal. Rptr. at 206.
258. *See id.*

fenses should be asserted by Attorney I in order to ensure the allocation of responsibility for the client's damages in accordance with the doctrine of comparative negligence. As the court stated in *American Motorcycle*: "[I]t is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence."[259]

(3) *Undivided Loyalty to Client*. It has been argued that the threat of a suit for indemnity by an adversary of the client impinges upon the undivided loyalty of the second attorney to his client.[260] This argument, however, fails to consider one obvious fact: Attorney II's self-interest in avoiding a malpractice suit exists whether or not the cross-claim for comparative indemnity is allowed. To permit the cause of action creates no additional conflict of interest that would influence Attorney II's judgment on behalf of his client.[261] Also, it is just as plausible, if not more so, that the threat of a cross-complaint by Attorney I would encourage Attorney II to use even greater care in protecting his client.[262] This is true because Attorney II can avoid all liability by simply fulfilling his duty to the client. The threat of a cross-claim for indemnity by Attorney I would merely act as an additional deterrent to a breach of the legal duty Attorney II owes his client.[263] As Justice Jefferson, dissenting in *Gibson* urged with substantial justification:

> [I]t is tenuous and speculative at best to conclude that permitting cross-complaints by lawyer I against lawyer II in a malpractice action against lawyer I will distort and adversely affect lawyer II's ability to devote his best efforts to serving his client. The *Goodman, Held*, and *Norton* rationale rests on an unexamined and unpersuasive hypothesis, namely, the belief that the possibility of an attorney's liability to third parties for negligence in advising a client will inhibit an attorney's best representation of his client even in a situation where there is no conflict between the interest of the client and the third party.[264]

Also unpersuasive is the suggestion that completely meritless cross-complaints might irresponsibly be filed against the plaintiff's attorney "motivated by naught but spite and a desire to spread confusion, dissention (sic) in the opponent's camp."[265] Ample deterrence is provided

259. 20 Cal. 3d at 590 n.2, 578 P.2d at 906, 146 Cal. Rptr. at 189.

260. *See supra* notes 220, 230-31 and accompanying text.

261. 94 Cal. App. 3d at 360, 156 Cal. Rptr. at 334 (Jefferson (Bernard), J., dissenting).

262. 92 Cal. App. 3d at 949, 155 Cal. Rptr. at 403; 117 Cal. App. 3d at 766, 173 Cal. Rptr. at 206.

263. *See* 117 Cal. App. 3d at 766, 173 Cal. Rptr. at 206; *see also* Note, *supra* note 3, at 130.

264. 94 Cal. App. 3d at 360, 156 Cal. Rptr. at 334.

265. 92 Cal. App. 3d at 945, 155 Cal. Rptr. at 400.

by the prospect of liability for malicious prosecution,[266] in which settled law permits the tort victim to recover the costs of defending the prior action including reasonable attorney's fees, compensation for injury to reputation or impairment of social and business standing in the community, and compensation for mental or emotional distress.[267]

One of the public policies served by permitting Attorney I to cross-claim for indemnity is that of judicial economy. As the California Supreme Court recognized in *Shepard & Morgan v. Lee & Daniel, Inc.*,[268] overburdened courts gain nothing from rules that discourage the filing of cross-complaints in favor of independent actions. The cross action procedure represents a more orderly and expeditious resolution of the controversy.[269] An additional factor favoring the indemnity cross-claim is one identified by Presiding Justice Cologne in his dissenting opinion in *Commercial Standard*:

> [T]he importance of having all tortfeasors before the court to secure a defendant's right of indemnity overrides the plaintiff's right to shield his attorney and, incidentally, his own behavior, on the issues he has raised by the lawsuit. I find the sanctity of their relationship in this regard no more sacred than the public policy calling for family harmony that was involved in *American Motorcycle*. . .where a parent was allowed to be joined as a tortfeasor for purposes of indemnity in his own child's action.[270]

Perhaps the most significant policy justification supporting Attorney I's cross-claim is that embodied in the *Li* and *American Motorcycle* decisions. In abrogating the harsh "all or nothing" doctrine of contribution, the court in *Li* relied upon the intent of the California Legislature as expressed by Civil Code section 1714.[271] That code section states that every person is responsible for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person.[272] This rule applies only to the extent that the person injured

266. 117 Cal. App. 3d at 766, 173 Cal. Rptr. at 206.

267. Bertero v. National General Corp., 13 Cal. 3d 43, 51, 529 P.2d 608, 614, 118 Cal. Rptr. 184, 190 (1974). The California Supreme Court in *Bertero* recognized that an actionable claim for the malicious prosecution of a cross-claim filed without probable cause can be stated. As the result of *Bertero*, Attorney II can maintain a cause of action for malicious prosecution based upon Attorney I's cross-claim for comparative indemnity, and may recover if the indemnity action commenced by Attorney I is: (1) pursued to a legal termination in Attorney II's favor; (2) brought without probable cause; and (3) initiated with malice.

268. 31 Cal. 3d 256, 261, 643 P.2d 968, 970, 182 Cal. Rptr. 351, 353 (1982).

269. *See Id.*; Teachers Ins. Co. v. Smith, 128 Cal. App. 3d 862, 866, 180 Cal. Rptr. 701, 704 (1982) (A claim for comparative indemnity is independent and can be brought in a separate suit after the settlement or after satisfaction of judgment in the underlying suit); *see also* People *ex rel.* Dept. of Transportation v. Superior Court, 26 Cal. 3d 744, 748, 608 P.2d 673, 676, 163 Cal. Rptr. 585, 588 (1980).

270. 92 Cal. App. 3d at 953, 155 Cal. Rptr. at 405.

271. 13 Cal. 3d at 821, 532 P.2d at 1238, 119 Cal. Rptr. at 870.

272. CAL. CIV. CODE §1714.

has not willfully or by want of ordinary care brought the injury upon himself. Further, this responsibility may not be escaped simply because another act—either an "innocent" occurrence such as an "act of God" or other negligent conduct—may also have been a cause of the injury.[273]

The *Li* court specifically noted that the statutory language of section 1714 has not prevented the active judicial development of the twin concepts of duty of care and proximate cause.[274] In addition, section 1714 has not hindered the development of rules permitting a finding of liability in the absence of direct evidence establishing a defendant's negligence as the actual cause of the damage.[275] The *Li* court concluded that the Code should be construed liberally in accordance with the historical development of judicial doctrines to "give dynamic expression to the fundamental precepts which it summarizes."[276] These fundamental precepts are: (1) one whose negligence has caused damage to another should be liable therefor, and (2) one whose negligence has contributed to his own injury should not be permitted to cast the burden of liability upon another.[277]

Neither of these fundamental precepts is served when a cross-claim for comparative indemnity is rejected in the successor attorney situation. Denying Attorney I's cross-claim could result, under the rules of joint and several liability, in Attorney II escaping all responsibility for damages proximately caused by his negligent conduct.[278] Attorney I could be forced to bear not only his share of the client's loss occasioned by his own negligence, but damages that could be attributed to Attorney II's behavior as well.[279] Certainly this outcome, resulting in the unjust enrichment of Attorney II at the expense of Attorney I, is not consistent with the policy expressed by the Legislature in section 1714.[280]

Even though Attorney I could assert the comparative negligence of Attorney II as an affirmative defense,[281] Attorney I should be given the alternative of filing a cross-complaint for indemnity for an additional reason. As enunciated in *American Motorcycle*, as between tortfeasors who contribute to a loss, each shall bear the loss in proportion to

273. *Id.*
274. 13 Cal. 3d at 822, 532 P.2d at 1239, 119 Cal. Rptr. at 871.
275. *Id.* (citing Summers v. Tice, 33 Cal. 2d 80, 154 P.2d 1, 5 (1948); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944)).
276. 13 Cal. 3d at 822, 532 P.2d at 1239, 119 Cal. Rptr. at 871.
277. *See id.*
278. *See* 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.
279. *Id.*
280. *See* 13 Cal. 3d at 822-23, 532 P.2d at 1239-40, 119 Cal. Rptr. at 870-71.
281. *See supra* notes 250-53 and accompanying text.

fault.[282] The court in *American Motorcycle* emphasized this goal of loss allocation in requiring a modification of California's traditional all-or-nothing common law equitable indemnity doctrine.[283] Concurring with Dean Prosser's observation in a related context, the court stated that:

> [T]here is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were. . .unintentionally responsible, to be shouldered onto one alone. . .while the latter goes scot free.[284]

Clearly, the rejection of Attorney I's cross-claim flies in the face of this policy goal.

In summary, persuasive public policies embodied in the doctrines of comparative negligence and comparative indemnity should not be frustrated or ignored in favor of a policy that protects a negligent attorney under the guise of preserving the attorney-client relationship. As previously demonstrated, no substantial justification exists for placing the entire burden of a client's damages on the client's former attorney when the successor attorney is also blameworthy. Fairness dictates that the blameworthiness of all actors whose conduct was a proximate cause of the client's injury be treated consistently.

With the overriding nature of public policies underlying the doctrine of comparative indemnity made clear, reason and fairness mandate recognition of the comparative indemnity claim of Attorney I. As stated by the court in *Parker*: "Manifestly, the general rule allowing proportionate indemnity, subserving as it does this fundamental public policy [of encouraging persons to conduct themselves with reasonable care] should not be departed from in the absence of compelling reasons."[285] No valid reasons support a departure from the general rule in the successor attorney situation.

CONCLUSION

This comment has demonstrated that neither precedent nor policy considerations justify depriving an attorney of a cause of action either for professional negligence or comparative indemnity against a former client's present attorney whose negligent conduct allegedly caused or exacerbated the client's damages. To deny either of these claims would be to blatantly ignore the principles of equity and fairness which dic-

282. *See supra* notes 271-77 and accompanying text.
283. 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.
284. *Id.*, citing PROSSER, *supra* note 109, §50, at 307.
285. 117 Cal. App. 3d at 756, 173 Cal. Rptr. at 197.

tate that tortfeasors should bear responsibility for all consequences of their wrongs. Negligent attorneys should not be an exception.

An attorney should owe a duty of care to all who foreseeably may be injured by his negligent conduct in the absence of overriding policy considerations. Since the balancing of the *Biakanja* factors in the successor attorney situation weighs heavily in favor of imposing a duty to Attorney I upon Attorney II, this duty should be recognized. Attorney I's claim for professional negligence against Attorney II, consequently, should be allowed.

In addition to a cause of action for professional negligence, Attorney I should have available to him a claim for comparative indemnity. The important loss allocation principles of comparative negligence underlying the indemnity doctrine dictate that Attorney I's cross complaint for comparative indemnity should be denied only in compelling circumstances. No compelling circumstances are present in the successor attorney situation. Allegations that a cross-complaint for either comparative indemnity or professional negligence would impinge upon the undivided loyalty Attorney II owes the client are simply unfounded. A close analysis of the situation reveals that the interests of the client will best be served by sustaining the cross-complaints. Since the primary reason courts have refused to permit a cross-claim on either theory has been to preserve the sanctity of the attorney-client relationship, insufficient justification exists for the courts to deny Attorney I a remedy.

To deprive an attorney of a remedy for an injury inflicted upon him by his successor attorney is impermissibly inconsistent with firmly established public policies. The mere fact that a tortfeasor is also an attorney does not serve as a valid justification for courts to confer upon him an immunity from liability when the alleged benefits to be derived from that immunity are illusory and misperceived. Our judicial system can ill afford the preservation of a privileged protection from responsibility for members of the legal profession.

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